

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

C.M., a minor by and through his Mother and)
Next Friend, TERRI BROCK, and J.M., a)
minor by and through his Mother and Next)
Friend, TERRI BROCK,)

Plaintiffs,)

v.)

JAMES BEINE a.k.a. MAR JAMES and)
BOARD OF EDUCATION OF THE CITY)
OF ST. LOUIS,)

Defendants.)

Case No.: 4:04CV01326SNL

**DEFENDANT BOARD OF EDUCATION OF THE CITY OF ST. LOUIS'
MOTION TO DISMISS COUNTS I, VI, VII, VIII, IX, XII, XIII, XIV and XV OF
PLAINTIFFS' FIRST AMENDED COMPLAINT**

Defendant, Board of Education of the City of St. Louis ("Board of Education"), for its Motion To Dismiss Counts I, VI, VII, VIII, IX, XII, XIII, XIV and XV of Plaintiffs' First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, states as follows.

1. On or about September 14, 2004, Plaintiffs filed a Petition in the Circuit Court of the City of St. Louis, Missouri. The Petition originally named a number of defendants, including the Board of Education.

2. Defendant Board of Education filed Removal Pleadings on or about September 29, 2004, removing the matter to this Court based on federal question jurisdiction.

3. On October 27, 2004, this Court granted Defendant's Motion for More Definite Statement as to Counts I, XIII and XV in the Petition and ordered Plaintiffs to file an Amended Complaint. See e-file document # 13.

4. On October 27, 2004, this Court also granted Defendants' Motion challenging service on the individual defendants other than James Beine ("Beine"). See e-file document # 14.

5. Having first obtained Leave of Court, on November 4, 2004, Plaintiffs filed their First Amended Complaint. In this pleading, Plaintiffs name only Beine and the Board of Education as defendants. See e-file document # 16-19.

6. Counts I, VI, VII, VIII, IX, XII, XIII, XIV and XV of Plaintiffs' First Amended Complaint are replete with legal conclusions, contain conclusions couched as factual assertions, fail to attribute specific alleged conduct to particular defendants and lack clarity.

7. Plaintiffs' Section 1983 claim in Count I must fail because it fails to identify the official policy or custom of the Board of Education that caused the alleged injury as required. Count I also erroneously relies upon a *respondeat superior* theory of liability against the Board of Education.

8. The Board of Education is immune from liability under the doctrine of sovereign immunity on Counts VI, VII, VIII, IX, XII and XIII of Plaintiffs' First Amended Complaint.

9. Count VII fails to plead the requirements to state a cause of action for Aiding and Abetting and Conspiracy and Count VII has no underlying claim for the Conspiracy claim.

10. The Missouri Child Abuse Reporting Statute cannot serve as a basis for a private cause of action as alleged in Count VIII.

11. Plaintiffs have failed to plead their claim for fraudulent misrepresentation in Count XIII with the specificity required by Rule 9(b) of the Federal Rules of Civil Procedure

12. Plaintiffs' Concealment of Material Facts claim in Count XIII is not a recognized claim in Missouri.

13. Count XIV is a derivative claim and must also be dismissed.

14. Plaintiffs erroneously rely upon a *respondeat superior* theory of liability for the Board of Education in their Title IX claim in Count XV.

15. Punitive damages are not allowed on a claim against a public entity pursuant to Mo.Rev.Stat. § 537.610.3 (2000) and therefore Plaintiffs' claim for punitive damages against the Board of Education must fail.

16. Defendant Board of Education, as a municipal corporation, is immune from claims for punitive damages in a § 1983 action as a matter of public policy. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

17. Punitive damages are unavailable against local governmental entities under Title IX.

18. Defendant contemporaneously files herewith and incorporates herein by reference its Memorandum in Support.

WHEREFORE, Defendant respectfully requests this Court Dismiss with Prejudice Counts I, VI, VII, VIII, IX, XII, XIII, XIV and XV of Plaintiffs' First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and for such other and further relief as the Court deems just and proper under the circumstances.

/s/ Lawrence J. Wadsack

Kenneth C. Brostron #2715

Lawrence J. Wadsack #67177

LASHLY & BAER, P.C.

714 Locust Street

St. Louis, Missouri 63101

(314) 621-2939

(314) 621-6844/Fax

Attorneys for Defendant

Board of Education of the City of St. Louis

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of November, 2004, the foregoing was electronically filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon: Donna Clark Frayne, Esq., Law Offices of John S. Wallach, P.C., 1015 Locust Street, Suite 1000, St. Louis, Missouri 63101, Attorneys for Plaintiffs.

/s/ Lawrence J. Wadsack